UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
AVENICA, INC., Debtor.	:	Case No. 17-41813-ESS

In re:	:	Chapter 11
GALLANT CAPITAL MARKETS, LTD., Debtor.	:	Case No. 17-41814-ESS

CHAPTER 11 TRUSTEE'S EMERGENCY MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE TRUSTEE TO HAVE THE DEBTORS' ESTATES PERFORM EMPLOYEE-RELATED OBLIGATIONS IN ACCORDANCE WITH CERTAIN PRE-PETITION PRACTICES OF THE DEBTORS

TO: THE HONORABLE ELIZABETH S. STONG, UNITED STATES BANKRUPTCY JUDGE

Esther DuVal, CPA, CFF, the Chapter 11 Trustee ("Trustee") for debtors and former debtors-in-possession Avenica, Inc. ("Avenica") and Gallant Capital Markets, Ltd., ("Gallant," together with Avenica, the "Debtors") in the above-captioned, related chapter 11 cases (the "Chapter 11 Cases"), by and through proposed counsel, files this Emergency Motion for Entry of an Order Authorizing the Trustee to have the Debtors' Estates Perform Employee Related Obligations in Accordance with Certain Pre-Petition Practices of the Debtors (the “Employee Motion”), pursuant to 11 U.S.C. §§ 105(a) and 363 and Fed. R. Bankr. P. 9006(c) and 9013 and this Court’s Local Bankruptcy Rule 9077-1, and respectfully states as follows:

INTRODUCTION

1. While the Trustee seeks to proceed in the ordinary course with respect to payment of outstanding employee-related obligations arising post-petition and due in the ordinary course, the Trustee seeks entry of an order, substantially in the form of the proposed order attached hereto as **Exhibit A**, out of an abundance of caution and in the interest of keeping the Court and parties-in-interest apprised of the state of affairs, with respect to the Debtors' bankruptcy estates (the "Debtors' Estates") and employees.

2. For the avoidance of doubt, the Trustee does not seek to pay any prepetition salaries or benefits. Rather, the Trustee seeks to adhere to the prepetition practice of the Debtors, as the Trustee understands them at this time, whereby employees received their paychecks by Gallant funding Avenica, to the extent necessary, so that Avenica can in turn meet payroll obligations. The next regularly scheduled payment to employees for payroll is this Friday, June 9, 2017, for the pay period from May 20, 2017 through June 2, 2017, which is why this Employee Motion is brought on an emergency basis.

JURISDICTION

3. This Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding within this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief requested herein are sections 105(a) and 363 and of the Bankruptcy Code, Bankruptcy Rules 9006(c) and 9013 and this Court's Local Bankruptcy Rule 9077-1.

BACKGROUND

4. On April 14, 2017, (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. (**Dkt. No. 1, Case Nos. 17-41813 and 17-**

41814).

5. On May 24, 2017, in response to the United States Trustee's Applications for Orders Approving the Appointment of a Chapter 11 Trustee in the Gallant and Avenica bankruptcy cases, the Debtors and Debtors-in-Possession, respectively, consented to the appointment of a Chapter 11 Trustee.

6. On May 25, 2017, the Court entered Orders Authorizing the Appointment of a Chapter 11 Trustee.

7. The Debtors continued in possession of their property and the management of their business affairs as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code until May 30, 2017.

8. On May 30, 2017 (the "Appointment Date"), the United States Trustee filed Notices of Appointment of Chapter 11 Trustee appointing Esther DuVal, CPA, CFF, as Trustee of Gallant and Avenica **(Dkt. No. 69, Case No. 17-41813; Dkt. No. 57, Case No. 17-41814)**, and the Court entered Orders Approving Appointment of Chapter 11 Trustee, pursuant to which the Trustee's appointments were approved. The Trustee filed her Notices of Acceptance and Bonds on June 2, 2017 **(Dkt. No. 73; Case No. 17-41813; Dkt. No. 61, Case No. 17-41814**).

RELIEF REQUESTED

9. The Trustee was appointed only one week ago and the circumstances addressed herein reflect the Trustee's understanding at this time of certain aspects of Gallant's and Avenica's business operations as they relate to employees. The Trustee fully expects that additional facts will be determined in time that may relate to this Employee Motion. Notwithstanding, the Trustee moves now on an emergency basis due to the Trustee's desire to ensure that employees are timely paid by this Friday, June 9, 2017, for services rendered for the post-petition pay period

from May 20, 2017 through June 2, 2017. *See* Declaration of Esther DuVal, CPA, CFF (the "DuVal Declaration"), submitted herewith, at ¶ 3.

10. Based upon the Trustee's immediate investigation into the affairs of Gallant and Avenica, it is the Trustee's understanding that Gallant functioned as a foreign currency exchange trading platform and developer and/or reseller of trading platforms, programs, software and intellectual property. Avenica functioned essentially as an employment agency whose employees operated Gallant. DuVal Declaration at ¶ 4.

11. By virtue of this arrangement, it is also the Trustee's understanding that Gallant funded Avenica, to the extent necessary, such that Avenica could meet payroll obligations. DuVal Declaration at ¶ 5.

12. Notwithstanding Avenica's seemingly narrow purpose, Avenica contracted with ADP TotalSource, Inc. ("TotalSource") to house its employees with TotalSource as a co-employer, which shifted significant human resource related functions from Avenica to TotalSource. This relationship also provided an opportunity for employees to access insurance programs through TotalSource that Avenica may not have been able to access on its own. DuVal Declaration at ¶ 6.

13. On May 5, 2017 TotalSource filed its Motion for Relief from Stay seeking to cancel its agreement with Avenica (the "TotalSource Motion")(**Dkt. No. 23; Case No. 17-41813**).

14. The TotalSource Motion was resolved through a Stipulation entered into by and between the Debtor-in-Possession and TotalSource on May 11, 2017 (the "Stipulation")(**Dkt. No. 51; Case No. 17-41813**), prior to the Trustee's appointment.

15. On May 30, 2017, the Trustee was appointed as Chapter 11 Trustee of Avenica

and Gallant.

16. On May 31, 2017, the Trustee's proposed counsel contacted TotalSource's counsel to discuss the transition of the Debtors' management to the Trustee and the Trustee's desire to avoid interruption to employee's payment of wages and benefits due and owing in connection with the post-petition period. As part of the Trustee's inquiry, the Trustee requested that TotalSource provide recent transaction history between TotalSource and Avenica so that the parties have a clear understanding of the current state of affairs. Unfortunately, TotalSource was unable to immediately provide the Trustee with a statement of Avenica's recent payments to TotalSource or of TotalSource's recent issuances of paychecks to employees that would verify the status of payments between the parties and adherence to the Stipulation.

17. On June 1, 2017, proposed counsel to the Trustee and TotalSource discussed the Stipulation's requirement of an advance payment on June 2, 2017 for the pay period of June 3, 2017 through June 16, 2017, to the extent necessary if payroll obligations were going to continue to accrue. That discussion also addressed the necessity of Gallant funding Avenica if Avenica is to have sufficient funds to meet immediate payroll obligations, as appears to have been the ordinary course of dealing between Gallant and Avenica.

18. On June 2, 2017, TotalSource's counsel advised the Trustee's proposed counsel via email that "Pursuant to paragraph 8 of the Stipulation, TotalSource has made the decision to terminate the Client Services Agreement effective as of the last day of the last payroll that TotalSource received full payment. TotalSource will be sending separate termination notices in accordance with its internal termination procedures."

19. Also on June 2, 2017, Stephanie Hansen of TotalSource issued a notice of contract termination (the "Hansen Notice") to Beata Zahorska of Avenica, TotalSource's business contact

at Avenica. The Hansen Notice states: "Due to the fact that Avenica failed to submit a wire for payment of the June 9th payroll by May 19th, as required in the Stipulation Settling Emergency Motion of ADP TotalSource, Inc. for Relief from the Automatic Stay, ADP TotalSource is exercising its right to terminate the contract between Avenica Inc., Avenica Solutions and ADP TotalSource, effective May 21, 2017." DuVal Declaration at ¶ 7.

20. The Trustee's understanding is that on or about June 1 or 2, 2017, TotalSource identified what it believes to be a missed payment by Avenica that was due on May 19, 2017 pursuant to the Stipulation, and as a result, TotalSource issued a notice of termination of the agreement between Avenica and TotalSource. DuVal Declaration at ¶ 8.

21. Due to TotalSource's notice of termination, the Trustee must now immediately take over certain payroll obligations to ensure that employees are timely paid by this Friday, June 9, 2017, in accordance with their normal pay schedule, for services provided from May 20, 2017 through June 2, 2017. DuVal Declaration at ¶ 9.

22. Pursuant to Section 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title… ." 11 U.S.C. § 105(a). Furthermore, Section 363 of the Bankruptcy Code provides that, "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). While the Trustee believes that the proposed authorizations requested are within the ordinary course of business of the Debtors, the instant Employee Motion is filed out of an abundance of caution at this early stage of the proceedings and to apprise the Court and parties-in-interest of the actions of the Trustee herein.

23. Section 363 of the Bankruptcy Code additionally provides that, "[i]f the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this

title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1). It is submitted that the proposed authorizations sought are within the ordinary course of business and within certain pre-petition practices of the Debtors as the facts are understood at this time. Notwithstanding, it is respectfully requested that the Court issue an order pursuant to Sections 105(a) and 363 of the Bankruptcy Code, substantially in the form annexed hereto as **Exhibit A**, for the reasons set forth herein.

24. Thus, the Trustee seeks entry of an order on short notice, substantially in the form attached hereto as **Exhibit A**, authorizing the Trustee to (i) remit payment from Gallant to Avenica, in order to enable Avenica to effectuate and meet its payroll obligations due to be paid on June 9, 2017 for the May 20, 2017 through June 2, 2017 pay period, and fund related expenses, and (ii) have Avenica (a) issue payment to a third party paycheck processor or paychecks directly to employees for amounts due and owing to employees for the May 20, 2017 through June 2, 2017 pay period, so that employees are timely paid on June 9, 2017, and (b) withhold, reserve and/or pay, to the extent necessary in the Trustee's sole discretion, monies owed for related taxes, withholdings and payroll related expenses. The proposed gross amounts to be paid to employees in connection with this Employee Motion are identified on **Schedule 1** annexed to the Declaration of Esther DuVal, CPA, CFF, as Chapter 11 Trustee in support of the within Employee Motion, and submitted herewith.[1]

25. The Trustee submits that the granting of the within motion for emergent relief is necessary and in the best interest of the Trustee, the Debtors and the Debtors' Estates.

26. No previous request for the relief sought herein has been made to this Court or any

[1] Employees are identified by initials only in Schedule 1.

other court.

27. In light of the emergency nature of the relief sought, the Trustee seeks a waiver of the notice requirements of Bankruptcy Rule 6004, to the extent they may be deemed to apply.

28. Due to the Trustee's continuing investigation into the affairs of the Debtors which began only one week ago, the Trustee expressly reserves any and all rights with respect to all parties.

WHEREFORE, the Trustee respectfully requests that this Court enter an order on short notice, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and further relief as this Court deems just and proper.

Dated: June 7, 2017

PORZIO, BROMBERG & NEWMAN, P.C.
Proposed Counsel for Chapter 11 Trustee, Esther DuVal, CPA

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